No. 15105

United States Court of Appeals

for the Ninth Circuit

PALO ALTO MUTUAL SAVINGS AND LOAN ASSOCIATION,

Appellant,

vs.

RALPH E. WILLIAMS, Trustee in Bankruptcy of JOHN E. DUSKIN, Formerly Known as John E. Duskin, General Contractors, Bankrupt,

Appellee.

Transcript of Record

Appeal from the United States District Court for the Northern District of California. Southern Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif. — 7-27-56

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

LORENZ COSTELLO,
624 University Avenue,
Palo Alto, California;

CLARENDON W. ANDERSON,
Bank of America Building,
Santa Rosa, California;

FABER L. JOHNSTON, JR.,
First National Bank Building,
San Jose, California,

Attorneys for Appellant.

SHAPRO AND ROTHSCHILD,
DANIEL ARONSON, JR.,
155 Montgomery Street,
San Francisco, California,

Attorneys for Appellee.

In the Southern Division of the United States District Court for the Northern District of California

No. 43333—In Bankruptcy

In the Matter of

JOHN E. DUSKIN, JR.,

Bankrupt.

CLAIM OF LIEN TO REAL PROPERTY AND PROOF OF SECURED DEBT

United States of America,
Northern District of California,
County of Santa Clara—ss.

H. P. Stevens, being first duly sworn, deposes and says:

That he is an officer, to wit Vice President of Palo Alto Mutual Savings & Loan Association, a corporation (formerly Palo Alto Mutual Building & Loan Association, a corporation).

The above-named bankrupt was at and before the filing of the Petition in Bankruptcy herein, and is still, justly and truly indebted to said Palo Alto Mutual Savings & Loan Association in the sum of $11,606.83, together with interest thereon at the rate of $1.70 per day from March 18, 1955, together with $500.00 attorneys' fees. That said indebtedness is computed as follows:

Balance principal	$10,999.00
Interest through 3/18/55 at 5½%	473.08
Recording Notice of Default	3.50
Insurance premium advanced	131.25
	$11,606.83
Total amount due	$11,606.83

That said indebtedness is for money loaned as represented by a promissory note, photostatic copy of which is attached hereto, marked Exhibit "A" and made a part hereof. That said indebtedness is secured by a Deed of Trust executed by the Bankrupt above named, photostatic copy of which is attached hereto, marked Exhibit "B" and made a part hereof.

That the lien created in favor of claimant is superior to all other liens against the property, save and except current and delinquent taxes due the County of Santa Clara, or any subdivision thereof.

/s/ H. P. STEVENS.

Subscribed and sworn to before me this 11th day of March, 1955.

[Seal] /s/ CAROL B. HUGHES,
Notary Public in and for the County of Santa Clara, State of California.

My commission expires February 13, 1959.

EXHIBIT A

Loan No. LA729

$11,000.00

Los Altos, California, August 17, 1953.

For Value Received, the undersigned promise(s) to pay to Palo Alto Mutual Building and Loan Association, (a corporation), or order, at its office in Los Altos, California, or at such other place as the holder may designate, the principal sum of Eleven Thousand and no/100 Dollars ($11,000.00) with interest from date at the rate of five and one-half per centum (5½%) per annum on the balance remaining from time to time unpaid. Principal and interest shall be due and payable in advance in monthly installments of Seventy-seven and no/100 Dollars ($77.00) commencing on the first day of March, 1954, and on the first day of each month thereafter until the principal and interest are fully paid. And we hereby covenant and agree that each installment when paid shall be applied by the holder thereof, first $1.00 to dues on Installment Share Certificate No. 5722, then so much thereof as shall be required to pay interest due, and next the balance thereof to the repayment of the principal sum. All principal, interest and dues are payable in lawful money of the United States. In case of any default in the payment of any of said installments at the times and in the manner aforesaid, then such installments, so in default, shall bear interest from the date of their maturity until the date of payment

at the same rate of interest and shall compound monthly. At any time during such default of any installment or in any of the agreements contained in the deed of trust securing this note, the entire unpaid balance of said principal sum and interest shall, at the option of the holder of this note, and not otherwise, become immediately due and payable, of which election notice is hereby expressly waived, and the same shall thereafter bear interest at the same rate and be compounded monthly until paid.

The makers hereof reserve the privilege to repay this note in full upon the condition that if prepayment is made within 18 months from date, the makers hereof agree to pay, in addition to the balance due, a premium of 1½% of the original amount of this note; or in the event prepayment is made after 18 months from date but within 36 months from date, the makers hereof agree to pay in addition to the balance due a premium of 1% of the original amount of this note.

This note is secured by a deed of trust of even date herewith.

/s/ JOHN E. DUSKIN, JR.,

/s/ GERTRUDE L. DUSKIN.

EXHIBIT B

Loan No. LA729

Book 2708, Page 187

908999

This Deed of Trust, made this Seventeenth day of August, A.D. one thousand nine hundred and fifty-three. By and Between John E. Duskin, Jr., and Gertrude L. Duskin, his wife, as trustor, grantor, and Lorenz Costello & Kenneth A. Johnson as trustees, and the Palo Alto Mutual Building and Loan Association, a corporation, as lender.

Witnesseth: Whereas, the trustor has borrowed and received of the lender, in lawful money of the United States the sum of Eleven Thousand and no/100 ($11,000.00) Dollars, and in consideration of such loan the trustor has agreed to repay the same with interest, to the lender, or its order, in like money, according to the terms of a certain promissory note of even date herewith, executed and delivered for the sum of $11,000.00 by the trustor to the lender;

Now, This Indenture Witnesseth: That the trustor, in consideration of the premises and of the aforesaid indebtedness to the lender, and of One Dollar to the trustor in hand paid by the trustees, the receipt whereof is hereby acknowledged, and for the purpose of securing the payment of said promissory note, and of any sum or sums of money, with the interest thereon, that may be paid or advanced

by or may otherwise be due to the trustees or lender, under the provisions of this instrument, and also such additional sums as may be hereafter loaned by the lender or its successor to the trustor or any of them, or any successor in interest of the trustor, with interest thereon and evidenced by another promissory note of the said trustor, or any successor in interest of the trustor, as granted, bargained, sold, conveyed, and confirmed, and does hereby grant, bargain, sell, convey and confirm unto said trustees, in joint tenancy and to the survivor of them, their successors and assigns, all that property situate in the County of Santa Clara, State of California, and described as follows:

> Lot 15 as shown on the Map of Tract No. 1014 Bountiful Lands, filed for record June 1, 1953, in Book 42 of Maps, page 56, Santa Clara County Records.

Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof.

And, Also, all the estate, right, title and interest, homestead or other claim or demand, as well in law as in equity, which the trustor now has or may hereafter acquire of, in and to the said premises, with the appurtenances:

To Have and to Hold the same to the trustees, and to their successors and assigns, upon the trusts and confidences hereinafter expressed, to wit:

First.—During the continuance of these trusts, the lender and trustees or either of them, their successors and assigns, are hereby authorized to pay, without previous notice, all taxes, assessments and liens now subsisting or which may hereafter be imposed, by National, State, County, City, or other authority, or which may appear prima facie to subsist or be imposed upon said premises, to whomsoever assessed, and all or any incumbrances now subsisting or that may hereafter subsist thereon, which may, in their judgment affect said premises, or these trusts, at such time as in their judgment they may deem best; or, in their discretion, for the benefit and at the expense of the trustor, to contest the payment of any such taxes, assessments, liens or incumbrances, or defend any suit or proceeding instituted for the enforcement thereof; and it is expressly covenanted and agreed that the trustor will pay all or any taxes or assessments on the money which is or may be loaned hereunder, and on the instrument and the property hereby covered and obligation and obligations hereby secured; and in default thereof, the lender may at its option, without demand or notice, pay or satisfy such taxes or assessments, and pay and expend such sums of money as it may deem necessary therefor, and the amount thereof shall be repaid by the trustor to the lender upon demand, with interest thereon at rate provided in note hereby secured, and the amount thereof so expended by the lender shall be deemed secured by these presents until so repaid; and, in like manner, the lender is authorized to prosecute

or defend any suit or proceeding that it may consider proper to protect the title to said premises; and to keep the buildings and improvements now erected, or which may hereafter be erected, on said premises, insured against loss or damage by fire and other hazards as may be required and for such amounts and for such periods as may be required by the lender, with such company or companies as the lender may deem proper, loss, if any, payable to the lender; and these trusts shall be and continue as security to the lender and trustees, and their successors and assigns, for the repayment, in said lawful money, of the moneys so borrowed by the trustor, and the interest thereon, and of all amounts so paid out, and costs and expenses (including counsel fees) incurred as aforesaid, whether paid by the trustees or lender, with interest on such payments at rate provided in note hereby secured, until final payment, which disbursements and interest the trustor hereby agrees to pay.

It is understood and agreed that any and all insurance, of whatsoever kind and nature and in whatever amount, which may be taken out upon the improvements on said property, or any part thereof, shall be made, loss, if any, payable to the lender, and this clause shall constitute an irrevocable authority for the lender to collect, in case of loss, any and all proceeds of such insurance.

The Trustor agrees with respect to said property (a) property to care for and keep the same and the

improvements thereon in good condition and repair; (b) to complete in good and workmanlike manner any building which may be constructed thereon and to pay, when due, all claims for labor performed and materials furnished therefor, (cessation of work for a period of thirty (30) days on any unfinished improvement shall be deemed a default in the performance on part of the trustor), (c) not to remove or demolish any building thereon unless the consent of the Beneficiary is first had and obtained.

Secondly.—In case the trustor shall well and truly pay, or cause to be paid, at maturity, in lawful money as aforesaid, all sums of money, so borrowed as aforesaid, and the interest thereon, and shall, upon demand, repay all other moneys secured or intended to be secured hereby, and also the reasonable expenses of this trust, then the trustees, their successors or assigns, shall reconvey all the estate in the premises aforesaid to them by this instrument granted, unto the said trustor, his heirs and assigns, at his request and cost.

Thirdly.—If default shall be made in the payment of any of said sums of principal or interest or any part thereof when due, in the manner stipulated in said promissory note...., or in the reimbursement of any amounts herein provided to be paid, or of any interest thereon, or default be made in the performance on the part of the trustor, of any of the obligations in this instrument by him agreed to be kept and performed, then the lender, its successors or assigns, may elect to declare all

sums hereby secured to be immediately due and payable, and to cause the property hereby granted to be sold in order to accomplish the objects of these trusts; and, upon such election, shall record in the office of the Recorder of the County wherein the aforesaid granted premises or some part thereof are situated a notice of such breach or default, and of such election to sell said property, and after three months shall have elapsed following the recordation of said notice by the lender the trustees, their successors or assigns, on demand by the lender, or its assigns, and without demand on the trustor, shall sell said property or such part thereof as in their discretion they shall find necessary to sell in order to accomplish the objects of these trusts, having first given notice of the time and place of such sale in the manner and for the time, not less than that required by law, for sales of real property upon execution.

The Trustees may, from time to time, postpone such sale by such publication as they may deem reasonable, or without such publication, by proclamation made to the persons assembled, if any, at the time and place previously appointed and advertised for such sale; and on the day of sale so advertised, or to which such sale may be postponed, they may sell the property so advertised, or any portion thereof at public auction, in the county where any part of said property may be situated, to the highest cash bidder, and the holder or holders of said promissory note...., their agents or assigns, or any

member or director of said lender, may bid and purchase at such sale.

Said trustees may sell said above-described premises as a whole, or, in their discretion in such reasonable parcels or subdivisions as they in their judgment may deem advisable, and in conducting the sale they may act themselves or through the agency of an auctioneer or agent.

And the trustees, their successors or assigns, shall establish as one of the conditions of such sale that all bids and payments for said property shall be made in like lawful money as aforesaid and upon such sale they shall make, execute, and after due payment made, shall deliver to the purchaser or purchasers, his or their heirs and assigns, a deed or deeds of all interest derived to them hereunder in and to the premises so sold, being hereby expressly authorized to convey said premises in pursuance of the trusts herein set forth, and out of the proceeds thereof shall pay:

First.—The expenses of such sale, together with the reasonable expenses of this trust, including reasonable counsel fees in connection with sale, in lawful money, which shall become due upon any default made by the trustor in any of the payments aforesaid.

Second.—All sums which may have been paid, under or in accordance with the provisions hereof, by the lender, or the trustees, their successors or assigns, or the holders of the note. . . . aforesaid, and

not reimbursed, and which may then be due, whether paid on account of incumbrance or insurance as aforesaid, or in the performance of any of the trusts herein created, together with any additional sums borrowed as aforesaid, and with whatever interest may have accrued thereon; next, the amount due and unpaid on said promissory note. . . ., with whatever interest may have accrued thereon, and lastly the balance or surplus of such proceeds, if any, to the person or persons legally entitled thereto.

And, in the event of a sale of said premises, or any part thereof, and the execution of a deed or deeds therefor, under these trusts, then the recitals therein of default and the giving of notice of sale, and of a demand by the lender, its successors or assigns, that such sale should be made, shall be conclusive proof of such default and of the due giving of such notice, and that the sale was made on due and proper demand by the lender, its successors or assigns; and any such deed or deeds, with such recitals therein, shall be effectual and conclusive against the said trustor, his heirs or assigns, and all other persons as to such default, notice and demand; and the receipt for the purchase money contained in any deed executed to a purchaser, as aforesaid, shall be a sufficient discharge to such purchaser from all obligation to see to the proper application of the purchase money, according to the trusts aforesaid and the trustor upon the delivery of such deed or deeds hereby agrees to surrender,

immediately and without demand, possession of said property to such purchaser.

It is further expressly covenanted and agreed that, in case default be made in any of the payments as hereinabove mentioned, the said trustees, or the survivor of them, their successors or assigns, shall be entitled, at any time, at their option, either by themselves or by a receiver to be appointed by a court therefor, to enter upon and take possession of the above-granted premises, or any part thereof, and to do and perform such acts of repair or cultivation as may be necessary or proper to conserve the value thereof, and to collect and receive the rents, issues and profits thereof, and apply the same in the manner herein specified in respect to the proceeds of any sale of said premises, and, if action to enforce the provisions hereof shall be instituted, to exercise such other powers in respect to said premises as the court in which said suit is pending may direct; and the expenses there incurred, and also all expenses incurred by the lender in and about the making of the loan hereby secured, including counsel fees, shall be deemed to be a portion of the expense of this trust and secured thereby, as herein provided.

Acceptance by the lender of any sum in payment of any indebtedness secured hereby, after the date when the same is due, shall not constitute a waiver of the right either to require prompt payment, when due, of all other sums so secured, or to declare default, as herein provided, for failure so to pay; and

the lender may, after recording said notice of breach and election, waive or withdraw the same, or any proceedings thereunder, and shall thereupon be restored to its former position, and have and enjoy the same rights as though such notice had not been recorded.

As additional security, Trustor hereby gives to and confers upon lender the right, power and authority, during the continuance of these Trusts, to collect the rents, issues and profits of said property, reserving unto Trustor the right, prior to any default by Trustor in payment of any indebtedness secured hereby or in performance of any agreement hereunder, to collect and retain such rents, issues and profits as they become due and payable. Upon any such default, lender may at any time without notice, either in person, by agent, or by a receiver to be appointed by a court, and without regard to the adequacy of any security for the indebtedness hereby secured, enter upon and take possession of said property or any part thereof, in its own name sue for or otherwise collect such rents, issues and profits, including those past due and unpaid, and apply the same, less costs and expenses of operation and collection, including reasonable attorney's fees, upon any indebtedness secured hereby and in such order as lender may determine. The entering upon and taking possession of said property, the collection of such rents, issues and profits and the application thereof as aforesaid, shall not cure or waive any default or notice of default here-

under or invalidate any act done pursuant to such notice.

It is expressly covenanted that the lender may, by resolution of its Board of Directors, from time to time, appoint another trustee or other trustees to execute the trusts hereby created; and upon such appointment, the new trustee or trustees shall be vested with all the title, interest, powers, duties and trusts in the premises hereby vested in or conferred upon the trustees. Such new trustee or trustees shall be considered the successor or successors and assigns of the trustees within the meaning hereof.

A copy of such resolution, certified by the Secretary of the lender, under its corporate seal, shall be recorded in the office of the County Recorder of the County where the above-described real property is situated, and shall be conclusive proof of the proper appointment of such substituted trustee or trustees, or the authority of such substituted trustee or trustees may be evidenced by a conveyance to him or them by the trustee or trustees in whose place he or they have been appointed.

The trusts herein contained are irrevocable by the trustor. In the event of the sale of said premises, or any part thereof, without the written consent of the lender the entire balance of the principal and interest then remaining due, shall become immediately due and payable without notice.

The words "Trustor," "Grantor" and "Lender" wherever used in this instrument, shall, unless

otherwise specified, include the plural as well as the singular; if there is more than one trustor, the trustors' undertakings are joint and several; all provisions as to the "trustee" shall apply to the trustees when more than one, and to successors and assigns of the "trustee" exactly as if the words "successors and assigns" followed the word "trustee" in each instance; but if there be more than one trustee, either may act alone and execute said trusts, upon request of the lender, and all his acts hereunder shall be deemed to be the acts of all trustees, and the recital in any conveyance executed by such sole trustee of such request shall be conclusive evidence thereof and of the authority of such sole trustee to act.

The trustor hereby admits having received full notice that the trustees are now, or may hereafter become, stockholders or officers, or both, of the said lender and hereby consents that they, or such other stockholders or officers of said lender as may be substituted for either of them, may act as such trustees, and hereby waive all objections thereto.

In accordance with Sec. 2924b, Civil Code, the trustor hereby requests that a copy of any notice of default and a copy of any notice of sale under this deed of trust be mailed to trustor at the address given hereinafter.

In Witness Whereof, the said trustors have hereunto set their hands and seals the day and year first above written.

Signature of Trustor:

[Seal] /s/ JOHN E. DUSKIN, JR.,

[Seal] /s/ GERTRUDE L. DUSKIN.

Mailing address for notices of default and sale:

John E. Duskin, Jr.,
1036 Miramonte Ave., Mountain View, Cal.

Gertrude L. Duskin,
1036 Miramonte Ave., Mountain View, Cal.

State of California,
County of Santa Clara—ss.

On this 18th day of August, in the year one thousand nine hundred and fifty-three, before me, Phyllis B. Ohler, a Notary Public in and for said County, residing therein, duly commissioned and sworn, personally appeared John E. Duskin, Jr. and Gertrude L. Duskin known to me to be the persons described in, and who executed and whose names are subscribed to the within and foregoing instrument, and acknowledged that they executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[Seal] /s/ PHYLLIS B. OHLER,
Notary Public in and for Said County of Santa Clara, State of California.
My commission expires 12/21/55.

[Endorsed]: Filed March 15, 1955.

[Title of District Court and Cause.]

CLAIM OF LIEN TO REAL PROPERTY AND PROOF OF SECURED DEBT

United States of America,
Northern District of California,
County of Santa Clara—ss.

H. P. Stevens, being first duly sworn, deposes and says:

That he is an officer, to wit, Vice President of Palo Alto Mutual Savings & Loan Association, a corporation (formerly Palo Alto Mutual Building & Loan Association, a corporation).

The above-named Bankrupt was at and before the filing of the Petition in Bankruptcy herein, and is still, justly and truly indebted to said Palo Alto Mutual Savings & Loan Association in the sum of $11,755.02, together with interest thereon at the rate of $1.70 per day from March 18, 1955, together with $500.00 attorneys' fees. That said indebtedness is computed as follows:

Balance principal	$10,999.00
Interest through 3/18/55 at 5½% ...	692.02
Recording Notice of Default	3.50
Insurance premium advanced	60.50
	$11,755.02
Total amount due	$11,755.02

That said indebtedness is for money loaned as represented by a promissory note, photostatic copy

of which is attached hereto, marked Exhibit "A" and made a part hereof. That said indebtedness is secured by a Deed of Trust executed by the Bankrupt above named, photostatic copy of which is attached hereto, marked Exhibit "B" and made a part hereof.

That the lien created in favor of claimant is superior to all other liens against the property, save and except current and delinquent taxes due the County of Santa Clara, or any subdivision thereof.

/s/ H. P. STEVENS.

Subscribed and sworn to before me this 11th day of March, 1955.

[Seal] /s/ CAROL B. HUGHES,
Notary Public in and for the County of Santa Clara, State of California.

My commission expires February 13, 1959.

[Endorsed]: Filed March 15, 1955.

[Title of District Court and Cause.]

CLAIM OF LIEN TO REAL PROPERTY AND PROOF OF SECURED DEBT

United States of America,
Northern District of California,
County of Santa Clara—ss.

H. P. Stevens, being first duly sworn, deposes and says:

That he is an officer, to wit Vice President of Palo Alto Mutual Savings & Loan Association, a corporation (formerly Palo Alto Mutual Building & Loan Association, a corporation).

The above-named Bankrupt was at and before the filing of the Petition in Bankruptcy herein, and is still, justly and truly indebted to said Palo Alto Mutual Savings & Loan Association in the sum of $11,720.98, together with interest thereon at the rate of $1.70 per day from March 18, 1955, together with $500.00 attorneys' fees. That said indebtedness is computed as follows:

Balance principal	$10,999.00
Interest through 3/18/55 at 5½%...	587.23
Recording Notice of Default	3.50
Insurance premium advanced	131.25
	11,720.98
Total amount due.....	$11,720.98

That said indebtedness is for money loaned as represented by a promissory note, photostatic copy of which is attached hereto, marked Exhibit "A" and made a part hereof. That said indebtedness is secured by a Deed of Trust executed by the Bankrupt above named, photostatic copy of which is attached hereto, marked Exhibit "B" and made a part hereof.

That the lien created in favor of claimant is superior to all other liens against the property, save

and except current and delinquent taxes due the County of Santa Clara, or any subdivision thereof.

/s/ H. P. STEVENS.

Subscribed and sworn to before me this 11th day of March, 1955.

[Seal] /s/ CAROL B. HUGHES,
Notary Public in and for the County of Santa Clara, State of California.

My commission expires February 13, 1959.

[Endorsed]: Filed March 15, 1955.

[Title of District Court and Cause.]

TRUSTEE'S OBJECTIONS TO PROOFS OF SECURED CLAIMS OF PALO ALTO MUTUAL SAVINGS & LOAN ASSOCIATION

Comes now Ralph E. Williams, and respectfully represents:

That he is the duly appointed, qualified and acting Trustee of the estate of the Bankrupt above named, and hereby objects to the allowance by the above-entitled Court of those certain Proofs of Secured Claims heretofore filed herein by Palo Alto Mutual Savings & Loan Association in the sum of Twelve Thousand Two Hundred Twenty Dollars and Ninety-eight ($12,220.98) Cents, and Twelve Thousand One Hundred Six Dollars and Eighty-three ($12,106.83) Cents, insofar as said proofs of

secured claims claim interest on the principal sum from and after the 14th day of July, 1954, the date of the filing of the original Petition in Bankruptcy herein, for recording charges, and for attorneys' fees.

Wherefore, said Trustee prays that his foregoing Objections to each of said Proofs of Secured Claims of said Palo Alto Mutual Savings & Loan Association be by this Court sustained, and that said claims be disallowed insofar as they claim interest after the said 14th day of July, 1954, recording charges and attorneys' fees; and for such other and different order as to this Court may seem just and proper in the premises.

RALPH E. WILLIAMS,
Trustee;

By /s/ DANIEL ARONSON, JR.,
One of His Attorneys.

Duly verified.

[Endorsed]: Filed April 22, 1955.

[Title of District Court and Cause.]

ORDER SUSTAINING TRUSTEE'S OBJECTIONS TO PROOFS OF SECURED CLAIMS OF PALO ALTO MUTUAL SAVINGS & LOAN ASSOCIATION

The Trustee's Objections to Proofs of Secured Claims of Palo Alto Mutual Savings & Loan As-

sociation, together with the Order to Show Cause thereon issued by the above-entitled Court on the 22nd day of April, 1955, together with the Answer thereto of said Palo Alto Mutual Savings & Loan Association, having regularly come on for hearing before the above-entitled Court on the 4th day of May, 1955, said Trustee being represented by Messrs. Shapro & Rothschild (Daniel Aronson, Jr., Esq., appearing), his attorneys, and said Palo Alto Mutual Savings & Loan Association being represented by Messrs. Costello & Johnson (Lorenz Costello, Esq., appearing), its attorneys, and testimony having been introduced by said Trustee in support of said Objections, and by Claimant in opposition thereto, and the matter having been submitted for decision and the Court being fully advised in the premises, Finds:

1.

That each and all of the allegations contained in Paragraphs I, II, III and IV of said Claimant's Answer to Order to Show Cause are True.

2.

That each and all of the allegations contained in Paragraphs V, VI and VII of said Claimant's Answer to Order to Show Cause are untrue.

3.

That on the date of the filing of the original Petition in Bankruptcy herein, to wit, the 14th day of July, 1954, there was due under the Deed of Trust for which Parcel 1 was security, the principal

sum of Ten Thousand Nine Hundred Ninety-nine ($10,999.00) Dollars, together with interest thereon at the rate of five and one-half per cent (5½%) per annum in the sum of Fifty-four Dollars and Eighty-eight ($54.88) Cents, together with the cost of insurance premium advanced in the sum of One Hundred Thirty-one Dollars and Twenty-five ($131.25) Cents, or a total of Eleven Thousand One Hundred Eighty-five Dollars and Thirteen ($11,185.13) Cents, and on the Deed of Trust for which Parcel 2 herein was security, the principal sum of Ten Thousand Nine Hundred Ninety-nine ($10,999.00) Dollars, together with interest thereon at the rate of five and one-half per cent (5½%) per annum in the sum of One Hundred Sixty-nine Dollars and Three ($169.03) Cents, together with the cost of insurance premium advanced in the sum of One Hundred Thirty-one Dollars and Twenty-five ($131.25) Cents, or a total of Eleven Thousand Two Hundred Ninety-nine Dollars and Twenty-eight ($11,299.28) Cents, and that as to both of said Deeds of Trust interest accrues at the rate of One Dollar and Seventy ($1.70) Cents per day from the said 14th day of July, 1954.

4.

That no notice of default and election to sell was executed and recorded by said Claimant until August 27, 1954.

5.

That both Parcels 1 and 2 were sold by said Trustee for a sum sufficient to pay the principal sum,

together with interest thereon to date of payment due under the respective deeds of trust on said property, plus the costs of sale, but for a sum insufficient to pay in full the second deeds of trust thereon.

Wherefore, the Court Concludes:

That it is bound by the decision in Beecher vs. Leavenworth State Bank, 192 F. 2d. 10 (9th Cir., 1951), and by the decision In Re California Constructors, Inc., Bankrupt, No. 38991 in the records and files of this Court, dated June 10, 1953, to the effect that, as under the circumstances set forth in this case, interest stops on both secured and unsecured claims upon the date of the filing of the Petition in Bankruptcy (Sexton vs. Dreyfus, 219 U.S. 339, 55 L. Ed. 244), and

That the rights of all parties as to the non-exempt property of a Bankrupt become fixed as of the date of the filing of the Petition in Bankruptcy, and that a creditor cannot be compensated for costs and attorneys' fees incurred for steps taken to foreclose a claim against said property after the date of the filing of the original Petition in Bankruptcy, and good cause appearing therefor,

It Is Hereby Ordered, Adjudged and Decreed that said Trustee's Objections to Proofs of Secured Claims of Palo Alto Mutual Savings & Loan Association be, and the same are hereby sustained, and that said Proofs of Secured Claims be, and they are hereby disallowed insofar as they claim interest on

the obligations of deeds of trust more particularly herein described after the 14th day of July, 1954, and for costs advanced, attorneys' fees and recording charges.

Dated at San Jose, in said District, this 18th day of May, 1955.

/s/ BERNARD J. ABROTT,
Referee in Bankruptcy.

[Endorsed]: Filed May 18, 1955.

[Title of District Court and Cause.]

PETITION FOR REVIEW

Pursuant to Section 39(c) of the Bankruptcy Act, and laws applicable thereto, Palo Alto Mutual Savings and Loan Association (formerly Palo Alto Mutual Building and Loan Association) hereby petitions for a review by a Judge of the above-entitled Court, of the Referee's order sustaining trustee's objections to proof of claims, which order was made and entered on the 18th day of May, 1955, and a copy of which order is attached hereto, marked Exhibit "A," and incorporated herein by reference.

The errors in respect to said order are as follows:

Errors in Conclusions

1. The order is contrary to law, as set forth and established by the Supreme Court of the United States:

Sexton vs. Dreyfus,
219 U. S. 339, 55 L. ed. 244 (1911)

Louisville Joint Stock Land Bank vs. Radford (1935) 295 U. S. 555, 79 L. ed. 1593

Vanston Bond Holders vs. Green,
329 U. S. 156, 91 L. ed. 162 (1946)

(A) Of the reported cases, the order cites Beecher vs. Leavenworth State Bank, 192 F. (2d) 10 (9th Cir., 1951); Sexton vs. Dreyfus (supra), and In Re California Constructors, Inc., Bankrupt, No. 38991, in the records and files of this Court, and holds that in the present case interest on the secured claim (as well as on unsecured claims) stops on the date of filing of the petition.

This is not the law where there is a sale of the security free and clear of liens, the security by its terms includes the payment of interest, and the sale proceeds are sufficient to pay both principal and interest. These factors were not present in either the Beecher or Sexton cases.

The Supreme Court on at least two later occasions had distinguished the Sexton case on this very point.

In Sexton vs. Dreyfus (supra) creditors holding pledged securities sold the same after the bankrupt had filed, realizing not enough to pay even the principal secured. They attempted then to pay themselves interest first, the remainder on principal, and to prove the balance as general creditors against

the estate. No question arose as to what would be the rule if the proceeds were sufficient to cover both principal and interest—and obviously not, as there would then be no question of proving interest accruing after filing as a general creditor—as the creditors were attempting to do by indirection. Thus rightfully the rule as to interest stopping on unsecured claims was followed.

Twenty-four years later this same Supreme Court (Louisville Joint Stock Land Bank vs. Radford, supra) denounced the contention that interest on secured as well as unsecured claims ceases with the filing of the petition, where the situation deals with a sale free of liens, stating (footnote 31):

> "But the rule relied upon applies only when the secured creditor, having realized upon his security, is seeking as a general creditor to prove for the deficiency against the bankrupt estate. Sexton vs. Dreyfus, 219 U. S. 339, 55 L. ed. 244, 31 S. Ct. 256, 25 Am. Bankr. Rep. 363. It has no application when the mortgagee has a preferred claim against proceeds realized by the trustee from a sale of the security free of liens."

Thirty-five years after the Sexton Case, the Supreme Court decided Vanston Bond Holders vs. Green, 329 U.S. 156, 91 L. ed. 162 (1946). Here the sales proceeds were sufficient to pay principal and interest. In allowing interest to date of payment (but disallowing interest on that interest), again

the Supreme Court interprets the meaning of the Sexton Case, saying, on page 164:

> "Simple interest on secured claims accruing after the petition was filed was denied unless the security was worth more than the sum of principal and interest due. Sexton v. Dreyfus (U.S.) supra."

(Other excellent cases, including Oppenheimer vs. Oldham, 178 F. (2) 386, 1949 (C.A., 5th Tex.), and in Re Gotham Can Co. (1931) (C.A., 2nd N.Y.), 48 F. (2) 540, also carry clear discussions of the true application of the Sexton Case, but under this particular assignment of error we prefer to rely on the Supreme Court's own interpretation of its own case.)

(B) Neither the Referee nor the above-entitled District Court is in any sense of the word "bound" by the Beecher Case if in fact it reaches a legal conclusion contrary to the Supreme Court.

2. The order is contrary to the law obtaining in all other circuits of the United States which have handled this particular question:

Kagen vs. Industrial Washing Machine Co.
(1950), 182 F. (2) 139, 146. (1st Cir.)

Re Gotham Can Co.
(1931), 48 F. (2d) 540. (2nd Cir.)

Re Torchia
(1911), 185 F. 576, 188 F. 207. (3rd Cir.)

Littleton vs. Kincaid,
179 F. (2) 848, 852. (4th Cir.)

United States vs. Paddock,
187 F. (2d) 271. (5th Cir.)

Re Macomb Trailer Coach, Inc.
(1953), 200 F. (2) 611. (6th Cir.)

In Re Chicago R. I. & P. Ry. Co.,
155 F. (2) 889, 892. (7th Cir.)

Wilson vs. Dewey
(1943), 133 F. (2) 962 (Deed of Trust.)
(8th Cir.)

United States vs. Sampsell
(1946), 153 F. (2) 731. (9th Cir.)

In Re Deep Rock Oil Co.,
113 F. (2d) 266, 269 (1940). (10th Cir.)

In Re Fabacher, D.C.E.D.,
193 F. 556. (D.C.)

3. The order is contrary to law since the facts of this proceeding do not make the decision of Beecher vs. Leavenworth State Bank (supra) either controlling or applicable at all:

In the Beecher Case, creditors of Beecher held mortgages on his property. In April, 1939, they purchased the property at sheriff's sale after obtaining judgments of foreclosure in a Washington State Court. This constituted their "security" when, on February 1, 1940, Beecher filed in bankruptcy. There was no sale of the security in the bankruptcy

free and clear of liens, but an order allowing claims pursuant to Sec. 75 of the Act, which order disallowed interest on the debts after date of filing.

The Court discussed (pg. 13) two exceptions to the rule stopping interest—apparently those exceptions applying to that exact case—and went on to say:

> "Except as stated above, the only time in which a majority of modern cases have allowed interest after bankruptcy on secured claims is when the Courts have discovered equitable reasons for doing so. Vanston, etc., Committee vs. Green, 329 U.S. 156, 67 S. Ct. 237, 91 L. ed. 162 * * *"

At this point it is particularly important to remember that in the Vanston Case the security proceeds were sufficient to pay the interest, and the simple interest was allowed after bankruptcy (see discussion under point (1), our Specifications of error).

The bald distinction is thus apparent. The Beecher Case contains no evidence—no discussion—of whether any sales proceeds were or were not sufficient. Therefore, the reason for not going into the third exception to the rule save citing the Vanston Case in passing.

The policy basis of the Beecher Case might well be the regulations of Sec. 75—where the farmer-debtor is put into possession of his encumbered

property and allowed to operate his farm "out of debt" over a number of years.

Such is not the case where the bankruptcy court, without being required to wait many years, sells property free and clear of liens, as in the matter at hand.

The Supreme Court denied certiorari in the Beecher Case (343 U.S. 953, 96 L. ed. 1354, id., 344 U.S. 886). Two years later (May 18, 1953) the same Supreme Court denied certiorari in the case of Weeks vs. McInnis (id., in re Macomb Trailer Coach, Inc., 200 F. (2) 611 (6th Cir., 1953), cert. den. 345, U.S. 958.

In the Weeks Case a sale was ordered and made free and clear of liens, and not a proceeding pursuant to Sec. 75, et seq., of the Bankruptcy Act. The facts of the case showed the sales proceeds of the security were sufficient to pay interest to date of payment of principal, and this was allowed. Since the Weeks decision discussed the Beecher Case and considered it not applicable, the Supreme Court in denying certiorari in Weeks vs. McInnis must be assumed to have considered the striking difference between the two cases in allowing each to stand. Any other conclusion is untenable.

Secondly, the Beecher Case in no way mentions or discusses that interest after Bankruptcy was a part of the lien for security under Washington State Law. Although this may not be controlling (see Vanston, etc., Committee vs. Green, cited

supra), it is certainly persuasive in that under California Law the lien of a trust deed extends to the payment of interest where by the terms of the note and deed of trust it is so declared. (In re Haacke (D.C., Cal.) (2) Sawy 231, F. cas. No. 5583: Such interest is a part of the "sum for which the property is held as security.")

Oppenheimer vs. Oldham (1949, C.A., 5th), 178 F. (2) 386, was a Texas first deed of trust case where the security was sold by the bankruptcy court free and clear of liens, and the proceeds being sufficient to pay interest to date of payment of principal, interest was paid. After referring to the Vanston Case as authority for allowing such interest, the case goes on to make much of the rule that:

> "It has always been a fundamental principle of the bankruptcy law that the property rights and interests designed as liens and pledges, when valid in bankruptcy, shall not be impaired in the administration of a bankrupt estate,

4. The order fails to take into consideration the additional equities arising when claimant, at a time when bankrupt was in default and a breach could be declared, instead, at trustee's special instance and request, advanced additional funds after the adjudication to complete the home, the order holding that no interest can be allowed on these amounts either.

Pertinent Facts Not Mentioned in Findings Effecting Jurisdiction

That the property referred to in Referee's Order Sustaining Trustee's Objection to Proofs of secured claims of Palo Alto Mutual Savings and Loan Association designed as Parcel I as security of the principal sum of $10,999.00 and Parcel II as security of the principal sum of $10,999.00, as loans executed by John E. Duskin, Jr. (the bankrupt herein) and Gertrude L. Duskin, his wife, dated August 17, 1953, and recorded August 24, 1953, in Book 2708 of Official Records of Santa Clara County at Pages 183 and 187 respectively. That at the time of the execution of said deeds of trust which were given as security for construction loans, the said John E. Duskin, Jr., and Gertrude L. Duskin, his wife, possessed title to the said security as joint tenants. That Gertrude L. Duskin has never been adjudicated a bankrupt, and since the adjudication of John E. Duskin, Jr., John E. Duskin, Jr., has become deceased. That by reason of title being in the name of Gertrude L. Duskin, the Bankruptcy Trustee had no jurisdiction to sell the half interest of Gertrude L. Duskin, nor the total interest by reason of the death of John E. Duskin, Jr.; and not having jurisdiction or title or possession, no right to object to the payment of interest and attorneys' fees owing to the Palo Alto Mutual Savings and Loan Association.

Denial of Palo Alto Mutual Savings and Loan Association Claim for Interest on Their Secured Loans Is Contrary to Public Policy.

The Palo Alto Mutual Savings and Loan Association is a lending institution created under the laws of the State of California and regulated by both State and Federal laws, and accepts deposits from the public in anticipation of a fair return on their investment. That said Association, in addition thereto, has all of their accounts up to $10,000.00 protected by Federal Agency Insurance. That said Association also has the privilege and does borrow money directly from Federal Government Agencies and is obligated thereunder to pay interest on said monies so borrowed by the Association. To deny the Association interest on monies advanced would be against public policy, as the Association is obligated under the law to protect the money of their investors and guarantee the payment of interest to them. To deny interest by the Bankruptcy Trustee would, in turn, jeopardize these public interests.

The Bankruptcy Estate as Far as Unsecured Creditors Are Concerned Is Not Affected by the Allowing or Disallowing of Interest on These Obligations.

Both of the properties referred to in this proceeding have been solely financed by the Association, and the holder of the second deed of trust; and by denying interest to the Association merely

benefits the holder of the second deed of trust who had full knowledge of the first encumbrance in favor of the Association. Any savings by the Bankruptcy Trustee will only result in an adjustment with the holder of the second deed of trust but will be of no benefit to the bankrupt estate.

Wherefore, Petitioner prays for a review of the above set forth Order pursuant to Section 39(c) of the Bankruptcy Act, and for a judgment and decree of the above-entitled Court setting aside the Referee's Order and/or modifying the same; overrule Trustee's objection to Petitioner's secured claims and allow Petitioner interest accruing on the principal sum from August 17, 1953, to and including date of actual payment of the principal sum due and owing to the Association; and for an Order decreeing that the Bankruptcy Trustee has no jurisdiction over the portion of the securities owned by Gertrude L. Duskin, who has not been decreed a bankrupt; and for such other relief as to the Court seems just.

PALO ALTO MUTUAL
SAVINGS & LOAN ASS'N,

By /s/ H. P. STEVENS,
Petitioner, Vice President.

Duly verified.

[Endorsed]: Filed June 16, 1955.

[Title of District Court and Cause.]

REFEREE'S CERTIFICATE ON PETITION FOR REVIEW OF REFEREE'S ORDER SUSTAINING TRUSTEE'S OBJECTIONS TO PROOFS OF SECURED CLAIMS OF PALO ALTO MUTUAL SAVINGS & LOAN ASSOCIATION

The undersigned, one of the Referees in Bankruptcy, in accordance with provisions of Section 39a of the Bankruptcy Act, hereby certifies as follows:

I.

Preliminary Proceedings and Statement of Facts

That on July 14, 1954, an involuntary Petition in Bankruptcy was filed with the above-entitled Court against John E. Duskin, Jr., and on August 19, 1954, the said John E. Duskin, Jr., was adjudicated Bankrupt and the matter was referred to the undersigned Referee to take such further proceedings as may be required by the provisions of said Bankruptcy Act.

That on October 22, 1954, the undersigned made an order fixing the 5th day of November, 1954, at the hour of 10:00 o'clock a.m. for the First Meeting of Creditors. That on the said 5th day of November, 1954, the undersigned made an order appointing Ralph E. Williams, of the City of San Jose, Trustee of the said estate, and that thereafter and on the 8th day of November, 1954, the undersigned made an order approving said Ralph

E. Williams' bond as such Trustee, and that said Ralph E. Williams has been and still is the duly appointed, qualified and acting Trustee of said estate.

That on August 17, 1953, Palo Alto Mutual Savings & Loan Association, a corporation, loaned to John E. Duskin, Jr., and to Gertrude L. Duskin, his wife, the sum of Eleven Thousand Dollars ($11,000.00), which loan was evidenced by a note at five and one-half per cent (5½%) interest and which note was secured by a first deed of trust on the real property which is referred to herein as Parcel 1 and which deed of trust was recorded on August 24, 1953, in Book 2708 of Official Records of the Recorder of the County of Santa Clara, at page 187. Also on the same date, said Palo Alto Mutual Savings & Loan Association, a corporation, loaned to John E. Duskin, Jr., and Gertrude L. Duskin, his wife, the additional sum of Eleven Thousand Dollars ($11,000.00), which loan was evidenced by a note at five and one-half per cent (5½%) interest and which note was secured by a first deed of trust on the real property which is referred to herein as Parcel 2 and which deed of trust was recorded on August 24, 1953, in Book 2708 of Official Records of the Recorder of the County of Santa Clara, page 183.

That on March 15, 1955, said Palo Alto Mutual Savings & Loan Association filed with the above-entitled Court its Proof of Claim for which Parcel 1 was security in the sum of Twelve Thousand One

Hundred Six Dollars and Eighty-four Cents ($12,106.84) and its Proof of Secured Claim for which Parcel 2 was security in the sum of Twelve Thousand Two Hundred Twenty Dollars and Ninety-eight Cents ($12,220.98) (the original Proofs of Claim of Palo Alto Mutual Savings & Loan Association filed March 15, 1955, are forwarded herewith as part of this certificate).

That on March 18, 1955, Parcel 1 was sold by the Trustee of the above estate, after due notice to said secured creditor, free and clear of all liens and encumbrances for the gross sales price of Thirteen Thousand Eight Hundred Dollars ($13,800.00). Prior to this time the Trustee had received no income whatsoever from this property. The net sales proceeds are sufficient to pay to Palo Alto Mutual Savings & Loan Association the principal sum, together with interest thereon, to the date of payment, together with additional advances, and a reasonable attorneys' fee. There are also as valid liens against the property the following: A second deed of trust which will receive only a partial payment and various mechanics lien claims which will receive nothing from the proceeds of the sale.

That on March 18, 1955, Parcel 2 was similarly sold by the Trustee of the above estate, free and clear of all liens and encumbrances for the gross sales price of Fourteen Thousand Three Hundred Dollars ($14,300.00). Prior to this time the Trustee had received no income whatsoever from this property. The net sales proceeds are sufficient to

pay to Palo Alto Mutual Savings & Loan Association the principal sum, together with interest thereon to the date of payment, together with additional advances and a reasonable attorneys' fee. There are also as valid liens against the property the following: A second deed of trust which will receive only a partial payment and various mechanic lien claims which will receive nothing from the proceeds of the sale.

That on April 22, 1955, there was filed in these proceedings Trustee's Objections to Proofs of Secured Claims of Palo Alto Mutual Savings & Loan Association; that on the said April 22, 1955, the undersigned made an order fixing May 4, 1955, at 2:00 o'clock p.m. as the time for the hearing of said Trustee's Objections; that on the said May 4, 1955, said Palo Alto Mutual Savings & Loan Association filed its Answer to Order to Show Cause (the original Trustee's Objections to Proofs of Secured Claims of Palo Alto Mutual Savings & Loan Association filed April 22, 1955, the original Order to Show Cause thereon issued April 22, 1955, and the original Answer to Order to Show Cause filed May 4, 1955, are forwarded herewith as part of this certificate); that on May 17, 1955, the undersigned Referee made an Order Sustaining the said Trustee's Objections to Proofs of Secured Claims of Palo Alto Mutual Savings & Loan Association (the original Order Sustaining Trustee's Objections to Proofs of Secured Claims of Palo Alto Mutual

Savings & Loan Association filed May 17, 1955, is forwarded herewith as part of this certificate).

II.

Referee's Findings

1. That said Trustee has heretofore conceded that there is due under the deed of trust for which Parcel 1 was security the principal sum of Ten Thousand Nine Hundred Ninety-nine Dollars ($10,-999.00), together with interest thereon at the rate of five and one-half per cent (5½%) per annum to the 14th day of July, 1954, the date of the filing of the original Petition in Bankruptcy herein, in the sum of Fifty-four Dollars and Eighty-eight Cents ($54.88), together with the cost of insurance premiums advanced in the sum of One Hundred Thirty-one Dollars and Twenty-five Cents ($131.25) or an aggregate total of Eleven Thousand One Hundred Eighty-five Dollars and Thirteen Cents ($11,185.13), and on the deed of trust for which Parcel 2 was security the principal sum of Ten Thousand Nine Hundred Ninety-nine Dollars ($10,-999.00), together with interest thereon at the rate of five and one-half per cent (5½%) per annum to the 14th day of July, 1954, date of the filing of the original Petition in Bankruptcy herein, in the sum of One Hundred Sixty-nine Dollars and Three Cents ($169.03.), together with the cost of insurance premiums advanced in the sum of One Hundred Thirty-one Dollars and Twenty-five Cents ($131.25), or a total of Eleven Thousand Two

Hundred Ninety-nine Dollars and Twenty-eight Cents ($11,299.28).

2. That each and all of the allegations contained in Paragraphs I, II, III, and IV of said Claimant's Answer to Order to Show Cause are true.

3. That each and all of the allegations contained in Paragraphs V, VI, and VII of Claimant's Answer to Order to Show Cause are untrue.

4. That no notice of default and election to sell was recorded by said Palo Alto Mutual Savings & Loan Association until August 27, 1954 (after bankruptcy).

5. That both Parcels 1 and 2 were sold by said Trustee for a sum sufficient to pay the principal sum, together with interest thereon to date of payment due under the respective deeds of trust on said property, plus the cost of sale, but for a sum insufficient to pay in full the second deed of trust thereon.

III.

Hearings

That at the time and place fixed for the hearing of said Trustee's Objections to Proofs of Secured Claims of Palo Alto Mutual Savings & Loan Association, there appeared before the undersigned the following: Daniel Aronson, Jr., Esq., of Shapro & Rothschild, San Francisco, California, for the Trustee, and Lorenz Costello of Costello & Johnson, Palo Alto, California, for Palo Alto Mutual Savings & Loan Association.

Said matter was heard and considered by the undersigned upon the records and pleadings and upon the oral stipulation as to facts as hereinabove set forth.

On May 17, 1955, the undersigned made his Order Sustaining Trustee's Objections to Proofs of Secured Claims of Palo Alto Mutual Savings & Loan Association.

IV.

Statement of Questions Presented

1. That interest stops on both secured and unsecured claims upon the date of the filing of the Petition in Bankruptcy. This Court is bound by the decision in Beecher vs. Leavenworth State Bank, 192 F. 2d 10 (9th Cir., 1951) and by the decision in In Re California Constructors, Inc., Bankrupt, No. 38991 in the records and files of the above-entitled Court dated June 10, 1953, and Sexton vs. Dreyfus, 219 U. S. 339, 54 L. Ed. 244; and

2. That the rights of all parties as to the non-exempt property of a bankrupt become fixed as of the date of the filing of the Petition in Bankruptcy, and that a creditor cannot be compensated for costs and attorney's fees incurred for steps taken to foreclose a claim against said property after the date of the filing of the original Petition in Bankruptcy.

V.

Review

That on June 16, 1955, Palo Alto Mutual Savings & Loan Association filed the instant Petition for

Review of said Order Sustaining Trustee's Objections to Proofs of Secured Claims of Palo Alto Mutual Savings & Loan Association.

Dated in Oakland in said District this 4th day of August, 1955.

Respectfully submitted,

/s/ BERNARD J. ABROTT,
Referee in Bankruptcy.

[Endorsed]: Filed August 3, 1955, Referee.

[Endorsed]: Filed August 12, 1955, U.S.D.C.

[Title of District Court and Cause.]

STIPULATION OF FACTS

It is stipulated by the Trustee in Bankruptcy herein and claimant, Palo Alto Mutual Savings and Loan Association, through their respective counsel, that the petition for review filed herein by said Palo Alto Mutual Savings and Loan Association may be submitted to the Court for decision upon the following statement of facts:

On and prior to July 14, 1954 (the date of filing petition in bankruptcy herein) John E. Duskin, Jr. (bankrupt herein) and Gertrude L. Duskin, his wife, were the owners in joint tenancy of two parcels of real property in Santa Clara County, California, described throughout the within proceedings as Parcel 1 and Parcel 2.

On August 17, 1953, said John E. Duskin, Jr., and Gertrude L. Duskin, his wife, borrowed from Palo Alto Mutual Savings and Loan Association the sum of Ten Thousand Nine Hundred Ninety-nine and no/100 Dollars ($10,999.00) evidenced by their promissory note, in writing, which provided for payment of interest at the rate of 5½% per annum. To secure the payment of said sum, with interest thereon, as well as other sums advanced by the lender, said John E. Duskin, Jr., and Gertrude L. Duskin, his wife, executed and delivered their deed of trust to Palo Alto Mutual Savings and Loan Association, as beneficiary, covering the property designated herein as Parcel 1. Said deed of trust was recorded in the office of the County Recorder of Santa Clara County, California, on August 24, 1953, in Book 2708 of Official Records, page 183, Santa Clara County Records. Said deed of trust, at the time of recording, was and remains a first lien of record against the property herein designated as Parcel 1. The principal sum of $10,999.00 borrowed by John E. Duskin, Jr., and Gertrude L. Duskin, his wife, as herein set forth, was used by them solely for the purpose of improving said real property described as Parcel 1 by the erection of a dwelling house thereon.

On July 14, 1954, there was due to Palo Alto Mutual Savings and Loan Association, under the terms of said promissory note and deed of trust, the sum of $10,999.00 principal, together with interest thereon at the rate of 5½% per annum in the sum

of $54.88, together with the cost of insurance premium advanced by Palo Alto Mutual Savings and Loan Association in the sum of $131.25, none of which sums have been paid.

Palo Alto Mutual Savings and Loan Association at all times since August 17, 1953, has been, and is now, the owner and holder of said promissory note and deed of trust.

Palo Alto Mutual Savings and Loan Association has duly filed its verified claim herein claiming the principal sum of said promissory note, with interest thereon to date of filing the petition in bankruptcy herein, accruing interest thereafter until paid, money advanced for insurance premiums, recording costs and attorneys' fees.

On August 17, 1953, said John E. Duskin, Jr., and Gertrude L. Duskin, his wife, borrowed from Palo Alto Mutual Savings and Loan Association the sum of Ten Thousand Nine Hundred Ninety-nine and no/100 Dollars ($10,999.00) evidenced by their promissory note, in writing, which provided for payment of interest at the rate of 5½% per annum. To secure the payment of said sum, with interest thereon, as well as other sums advanced by the lender, said John E. Duskin, Jr., and Gertrude L. Duskin, his wife, executed and delivered their deed of trust to Palo Alto Mutual Savings and Loan Association, as beneficiary, covering the property designated herein as Parcel 2. Said deed of trust was recorded in the office of the County Re-

corder of Santa Clara County, California, on August 24, 1953, in Book 2708 of Official Records, page 183, Santa Clara County Records. Said deed of trust, at the time of recording, was and remains a first lien of record against the property herein designated as Parcel 2. The principal sum of $10,999.00 borrowed by John E. Duskin, Jr., and Gertrude L. Duskin, his wife, as herein set forth, was used by them solely for the purpose of improving said real property described as Parcel 2 by the erection of a dwelling house thereon.

On July 14, 1954, there was due to Palo Alto Mutual Savings and Loan Association, under the terms of said promissory note and deed of trust, the sum of $10,999.00 principal, together with interest thereon at the rate of 5½% per annum in the sum of $169.03, together with the cost of insurance premium advanced by Palo Alto Mutual Savings and Loan Association in the sum of $131.25, none of which sums have been paid.

Palo Alto Mutual Savings and Loan Association at all times since August 17, 1953, has been, and is now, the owner and holder of said promissory note and deed of trust.

Palo Alto Mutual Savings and Loan Association has duly filed its verified claim herein claiming the principal sum of said promissory note, with interest thereon to date of filing the petition in bankruptcy herein, accruing interest thereafter until paid, money advanced for insurance premiums, recording costs and attorneys' fees.

At the time of filing the petition in bankruptcy herein there existed second deeds of trust upon the real properties herein mentioned, and there existed of record against said real property various claims of lien of material men or other persons who had contributed labor or services to the real property in question. Said second deeds of trust and each and all the claims of lien were subsequent in time and right to the deeds of trust executed by said bankrupt in favor of Palo Alto Mutual Savings and Loan Association.

On the 18th day of March, 1955, the trustee herein, pursuant to an order of the Referee in Bankruptcy, sold the real property mentioned herein as Parcel 1, free and clear of liens, for a sum sufficient to pay the principal sum amount due Palo Alto Mutual Savings and Loan Association under its deed of trust on said parcel, together with interest on said principal sum, as provided by the promissory note for which said deed of trust was given as security, to the date of sale and insurance premiums advanced by Palo Alto Mutual Savings and Loan Association.

On the 18th day of March, 1955, the trustee herein, pursuant to an order of the Referee in Bankruptcy, sold the real property mentioned herein as Parcel 2, free and clear of liens, for a sum sufficient to pay the principal amount due Palo Alto Mutual Savings and Loan Association under its deed of trust on said parcel, together with interest on said principal sum, as provided by the

promissory note for which said deed of trust was given as security, to the date of sale and insurance premiums advanced by Palo Alto Mutual Savings and Loan Association.

Subsequent to the sales above noted the trustee herein filed objections to the proofs of secured claims of Palo Alto Mutual Savings and Loan Association insofar as said claims applied to interest after the 14th day of July, 1954, recording charges and attorneys' fees. Said objections were sustained by the Referee in Bankruptcy.

In conection with the said claims of Palo Alto Mutual Savings and Loan Association the trustee refuses to pay claimant any sum or sums in excess of the principal amounts of said claims together with interest on said principal amounts to the date of filing petition in bankruptcy herein, and insurance premiums advanced by Palo Alto Mutual Savings and Loan Association.

It is further stipulated between the parties hereto that the Palo Alto Mutual Savings and Loan Association is a savings and lending institution created under the laws of the State of California and subject to the rules and regulations of the Building and Loan Commissioner of the State of California; and is subject to the laws and statutes of the United States of America regulating such lending institutions and subject to the rules, regulations and privileges afforded by Federal agencies empowered

by law to govern the operations of such savings and lending institutions.

Attached hereto as a part of this stipulation and marked "Exhibits 1 and 2" are photostatic copies of the two deeds of trust referred to herein.

Dated this 14th day of November, 1955.

LORENZ COSTELLO and
CLARENDON W. ANDERSON,
Attorneys for Palo Alto Mutual
Savings & Loan Association,

By /s/ LORENZ COSTELLO.

SHAPRO & ROTHSCHILD,
Attorneys for Trustee,

By /s/ DANIEL ARONSON, JR.

[Endorsed]: Filed December 12, 1955.

[Title of District Court and Cause.]

SUPPLEMENTAL STIPULATION OF FACTS

It Is Further Stipulated by and between the Trustee in Bankruptcy herein and the claimant, Palo Alto Mutual Savings and Loan Association, through their respective counsel, that on the 18th day of March, 1955, the Trustee herein, pursuant to an Order of the Referee in Bankruptcy, sold the real property mentioned in the original Stipulation as Parcel 1 and Parcel 2 free and clear of liens for a sum sufficient to pay the principal amounts due the Palo Alto Mutual Savings and Loan Association under its respective deeds of trust on said par-

cels, together with interest on said principal sums, as provided by said promissory notes for which said deeds of trust were given as security, to the date of sale, including insurance premiums advanced by the Palo Alto Mutual Savings and Loan Association.

The Referee in Bankruptcy sustained the Trustee's objection insofar as allowing interest on said promissory notes and deeds of trust after July 14, 1954 (the date of adjudication) is concerned.

It is further stipulated between the parties hereto that even though the interest were withheld after the date of adjudication, such interest withheld after the date of adjudication would not be available to the general unsecured creditors but would be applied to the holder of the second deeds of trust on the respective properties who, in each case, were also the purchasers at the Trustee's sale of the respective properties.

Dated: December 9, 1955.

LORENZ COSTELLO,
CLARENDON W. ANDERSON,
FABER L. JOHNSTON, JR.,
Attorneys for Palo Alto Mutual Savings & Loan Association,

By /s/ LORENZ COSTELLO.

SHAPRO & ROTHSCHILD,
Attorneys for Trustee,

By /s/ DANIEL ARONSON, JR.

[Endorsed]: Filed December 12, 1955.

[Title of District Court and Cause.]

SECOND SUPPLEMENTAL STIPULATION OF FACTS

It Is Further Stipulated by and between the Trustee in Bankruptcy herein and claimant, Palo Alto Mutual Savings & Loan Association, through their respective counsel of record, that said claimant did not at the special instance and request of said Trustee or any other person advance additional funds after the filing of the Petition herein to complete the homes or for any other purpose.

Dated: December 16, 1955.

SHAPRO & ROTHSCHILD,

By /s/ DANIEL ARONSON, JR.,
Attorneys for Trustee.

PALO ALTO MUTUAL
SAVINGS & LOAN ASS'N,

By /s/ LORENZ COSTELLO,
One of Its Attorneys.

[Endorsed]: Filed December 16, 1955.

[Title of District Court and Cause.]

MEMORANDUM AND ORDER

The Palo Alto Mutual Savings and Loan Association, a secured creditor of the bankrupt, has petioned this Court to review the Referee's order

denying the claim of the petitioner for post-bankruptcy interest on its secured claim. The Referee found that the property which was the security was sold by the Trustee for a sum sufficient to pay the principal sum, together with interest thereon to the date of payment due under the respective deeds of trust on said property, plus the costs of sale, but for a sum insufficient to pay in full the junior secured creditors.

In this situation the Referee considered himself bound by Beecher v. Leavenworth State Bank, 192 F. 2d 10 (Cir. 9, 1951). Petitioner urges that Beecher incorrectly holds that U. S. v. Sampsell, 153 F. 2d 731 (9 Cir., 1946) was overruled by Vanston Committee v. Green, 329 U. S. 156, and that in any event this case comes within the equitable exceptions set forth in Beecher.

Both the Referee and this Court are bound by the decision of the Court of Appeals for the Ninth Circuit in Beecher that Vanston overruled U. S. v. Sampsell on the question of whether post-bankruptcy interest should be allowed on a secured claim when the sale proceeds of the security were ample for that purpose.

As to the equities, the petitioner fails to come within any of the exceptions to the ban against the payment of post-bankruptcy interest set forth in Beecher. Here the estate is not solvent; nor is it shown that the security has yielded any income which could be used to pay post-bankruptcy inter-

est on the secured claim. The petitioner here basically is in no different position than the Bank in Beecher, and although the opinion in Beecher does not clearly indicate whether the proceeds from the sale of the security were sufficient to pay interest on the secured creditor's claim, the grounds for the decision in that case are applicable here where there are sufficient funds to pay interest on the secured creditor's claim for the period of time following bankruptcy to the sale of the security. The fact that the interest money thus preserved for the bankrupt's estate would go to a junior secured creditor, rather than other creditors does not alter the equities. Petitioner has proved no equity which would take this case out of the Beecher rule. For a similar situation see In the Matter of California Constructors, Inc., bankrupt, No. 38991 on the records and files of the United States District Court for the Northern District of California, Southern Division, and the memorandum opinion of Honorable Edward P. Murphy filed June 10, 1953.

It Is, Therefore, Ordered, Adjudged and Decreed that the Referee's order be and the same is hereby affirmed, and his report be, and the same is hereby approved.

Dated: February 13, 1956.

/s/ OLIVER J. CARTER,
United States District Judge.

[Endorsed]: Filed February 13, 1956.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that the Palo Alto Mutual Savings and Loan Association, corporation, a secured creditor of the Bankrupt, hereby appeals to the United States Court of Appeals for the Ninth Circuit from that certain Order approving the Referee's Order denying the claim of the Palo Alto Mutual Savings and Loan Association, corporation, a secured creditor of the Bankrupt, for post-bankruptcy interest on its secured claim, made and entered in the above-entitled proceedings by the Honorable Oliver J. Carter, one of the Judges of the above-entitled Court, February 15, 1956, which said Order approved the Order of the Referee in Bankruptcy, dated the 18th day of May, 1955, disallowing post-bankruptcy interest of the secured creditor of the Bankrupt in the estate of the above-named Bankrupt.

Dated: March 13, 1956.

LORENZ COSTELLO,
CLARENDON W. ANDERSON,
FABER L. JOHNSTON, JR.,

Attorneys for the Appellant, Palo Alto Mutual Savings and Loan Association, Formerly the Palo Alto Mutual Building and Loan Association, a Corporation,

By /s/ LORENZ COSTELLO.

[Endorsed]: Filed March 14, 1956.

[Title of District Court and Cause.]

UNDERTAKING FOR COSTS ON APPEAL

Whereas, Palo Alto Mutual Savings and Loan Association, Plaintiff and Appellant in the above-entitled action, has appealed to the United States Court of Appeals for the Ninth Circuit, from a judgment made and entered against it in the District Court of the United States for the Northern District of California, Southern Division, in favor of the Defendant in said action, on the 13th day of February, 1956; and

Whereas, the said appellant is required to give an undertaking for costs on appeal as hereinafter conditioned.

Now, Therefore, Fireman's Fund Indemnity Company, of San Francisco, California, in consideration of the premises, hereby undertakes on the part of the said appellant and acknowledges itself bound to the said Defendant in the sum of Two Hundred Fifty and no/100 Dollars ($250.00) that the said appellant will pay all costs which may be adjudged against it on said appeal or on a dismissal thereof, not exceeding, however, the sum of Two Hundred Fifty and no/100 Dollars ($250.00).

It Is Further Stipulated as a part of the foregoing understaking that in case of the breach of any condition thereof, the above-entitled District Court may, upon notice to the surety of not less

than 10 days, proceed summarily in said proceedings to ascertain the amount which the said surety is bound to pay on account of such breach and render judgment therefor against the said surety and award execution thereof.

Signed, sealed and dated this 13th day of March, 1956.

[Seal] FIREMAN'S FUND
INDEMNITY COMPANY,

By /s/ W. STANLEY PEARCE,
Attorney-In-Fact.

State of California,
County of Santa Clara—ss.

On this 13th day of March, 1956, before me, Esther M. Hedges, a Notary Public in and for said Santa Clara County, State aforesaid, residing therein, duly commissioned and sworn, personally appeared W. Stanley Pearce, known to me to be the person whose name is subscribed to the within instrument as the attorney in fact of Fireman's Fund Indemnity Company, and acknowledged to me that he subscribed the name of Fireman's Fund Indemnity Company thereto as principal, and his own as attorney in fact.

In Witness Whereof, I have hereunto set my hand and affixed my official seal, at my office in the

said County of Santa Clara, the day and year in this certificate first above written.

[Seal] /s/ ESTHER M. HEDGES,
Notary Public in and for the County of Santa Clara, State of California.

My commission expires August 22, 1959.

[Endorsed]: Filed March 14, 1956.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing and accompanying documents, listed below, are the originals filed in this Court in the above-entitled case and that they constitute the record on appeal herein as designated by the attorneys:

Claim of Lien to Real Property and Proof of Secured Debts.

Trustee's Objections to Proof of Secured Claims of Palo Alto Mutual Savings & Loan Association.

Order Sustaining Trustee's Objections to Proofs of Secured Claims of Palo Alto Mutual Savings and Loan Association.

Petition for Review.

Referee's Certificate on Petition for Review of Referee's Order Sustaining Trustee's Objections.

Stipulation of Facts.

Supplemental Stipulation of Facts.

Second Supplemental Stipulation of Facts.

Memorandum and Order.

Notice of Appeal.

Designation of Record on Appeal.

Undertaking for Costs.

Received 4/17/56.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court, this 17th day of April, 1956.

[Seal] C. W. CALBREATH,
Clerk,

/s/ WM. J. FLINN,
Deputy Clerk.

[Endorsed]: No. 15105. United States Court of Appeals for the Ninth Circuit. Palo Alto Mutual Savings and Loan Association, Appellant, vs. Ralph E. Williams, Trustee in Bankruptcy of John E. Duskin, Formerly Known as John E. Duskin, General Contractors, Bankrupt, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California Southern Division.

Filed April 17, 1956.

Docketed April 20, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

No. 15,105

In the Matter of:

JOHN E. DUSKIN, JR. (Formerly Doing Business as John E. Duskin, Jr., General Contractor),

Bankrupt.

APPELLANT'S CONCISE STATEMENT OF POINTS TO BE URGED ON APPEAL

Comes now, Palo Alto Mutual Savings and Loan Association, Appellant herein, and in accordance with Rule 17(6) of the Federal Rules of procedure specifies the following as a Concise Statement of Points of which it intends to rely on the Appeal from the Order Affirming Referee's Order sustaining Trustee's objections to proofs of secured claims of Palo Alto Mutual Savings and Loan Association made and entered by the Honorable Oliver J. Carter, United States District Court Judge for the Northern District of California, on February 13, 1956, and more particularly described in the Notice of Appeal heretofore filed with the clerk of the said Court on March 15, 1956, as follows:

(1) The District Court in said Order of February 13, 1956, erred in affirming the Order of the Referee in Bankruptcy, dated May 17, 1955, sustaining Trustee's objections to the proofs of the secured claims of the Palo Alto Mutual Savings and Loan Association;

(2) The District Court in said Order of February 13, 1956, erred in disallowing post-bankruptcy

interest of the secured claims of the Appellant herein;

(3) The District Court in said Order of February 13, 1956, erred in ruling that Palo Alto Mutual Savings and Loan Association, the Appellant herein, failed to prove equities to come within any of the exceptions to the ban against payment of post-bankruptcy interests;

(4) The District Court in the Order of February 13, 1956, erred in applying the rule concerning post-bankruptcy interest as applied in the Beecher case (Beecher v. Leavenworth State Bank, 192 F. 2nd, 10 (9th Cir., 1951) to the secured claims of the Appellant, as the facts and nature of the secured claims in the Beecher case are different and clearly distinguishable to the claims of the Appellant from the case at bar.

Dated April 23, 1956.

PALO ALTO MUTUAL
SAVINGS & LOAN ASS'N,
Appellant,

By /s/ LORENZ COSTELLO,
One of Its Attorneys.

Dated: April 23, 1956.

Receipt of copy acknowledged.

[Endorsed]: Filed April 26, 1956.